

No. 90-273

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COMMISSIONER OF REVENUE
OF THE STATE OF TENNESSEE,

Petitioner,

v.

NEWSWEEK, INC.; SOUTHERN LIVING, INC.;
and PROGRESSIVE FARMER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION OF NEWSWEEK, INC.

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Listing Pursuant to Rule 29.1

Respondent Newsweek, Inc. is a wholly-owned subsidiary of The Washington Post Company. The subsidiaries of either company (except wholly-owned subsidiaries) are as follows:

<i>Company</i>	<i>Place of Incorporation</i>
Bowater Mersey Paper Company Limited	Nova Scotia
Capital Fiber, Inc.	Maryland
The International Herald Tribune S.A.	France
Los Angeles Times-Washington Post News Service, Inc.	District of Columbia
Bear Island Paper Co.	Virginia (limited partnership)
Bear Island Timberlands Co.	Virginia (limited partnership)

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Statement of the Case

Tennessee purports to apply its sales tax to publications sold or delivered in Tennessee, except that “newspapers” and religious publications¹ are exempt from the tax.

¹ Because the Tennessee Supreme Court found Tennessee’s content-based, discriminatory taxing scheme to violate respondent’s right to Freedom of the Press, it did not reach the issue of whether the exemption for religious publications also rendered the tax scheme unconstitutional. In *dicta* that leaves no doubt as to how the Court would act on remand, the Court stated: “Nonetheless we believe the issue has been settled by the United States Supreme Court opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S. Ct. 890, _____ L. Ed.2d _____ (1989).” (App. 9).

Although the petitioner stipulated that respondent's² weekly publication, *Newsweek*, met all of the criteria defining a "newspaper" set forth in the Tennessee tax regulations (App. 21),³ petitioner nevertheless denied respondent an exemption from the state tax. Under protest, respondent paid assessed tax, penalty and interest on its subscription sales and sued for refund in the Tennessee Chancery Court. Each of the several issues raised by respondent (see App. 16-17, 26) was decided adversely to it in the Chancery Court.

Relying principally on this Court's decisions in *Minneapolis Star & Tribune v. Minn. Com'r. of Rev.*, 460 U.S. 575 (1983) and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), the Tennessee Supreme Court reversed. (App. A).

A Petition for Rehearing was denied by Order entered May 14, 1990. The Petition for Writ of Certiorari was filed on August 10, 1990 and served on respondent's counsel on August 13, 1990.

At trial, petitioner recognized that its discriminatory tax scheme could survive only if it was necessary to promote some compelling state interest. It defended its scheme as necessary "to further freedom of the press and to reduce regulation in the area of the press," and the Chancellor found these reasons to be "sufficiently compelling." (App. 22).

² Respondent, *Newsweek, Inc.* is one of three respondents named in the petition. It is unrelated either to *Southern Living, Inc.* or *Progressive Farmer, Inc.* *Newsweek's* complaint was tried separately in the Tennessee Chancery Court and is the subject of separate opinions in the Chancery Court and the Tennessee Supreme Court.

³ All appendix references ("App. ") are to petitioner's appendix, at the page indicated.

On respondent's appeal to the Tennessee Supreme Court, petitioner abandoned the rationale advanced to, and adopted by, the lower court. Instead, petitioner argued that its tax scheme which discriminates in favor of newspapers furthered a compelling public interest "by providing immediate and timely dissemination of information to the public." (App. 7). The Tennessee Supreme Court rejected this freshly-minted assertion of a governmental interest and found the tax scheme invalid under the First Amendment. (App. 7-8).

On the instant petition, petitioner abandons both of its previous attempts to establish a compelling state interest. Indeed, petitioner no longer contends that it can establish *any* compelling state interest and has opted instead to attempt to have its tax scheme judged by a lesser standard.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Question Presented By Petitioner Does Not Identify Any Issue Which Would Properly Be Before The Court If Certiorari Were Granted.

The question presented by petitioner (Petition, p. i) is erroneous in two important respects:

(1) It wrongly assumes that Tennessee's newspaper exemption is content-neutral, although the Tennessee Supreme Court found to the contrary. (App. 5-6). To enjoy the newspaper exemption a publication, *inter alia*, "must contain matters of general interest and reports of current events." Tennessee State Sales and Use Tax Regulation 1320-5-1-.46.2d (Rule 46(2)(d)), (App. 45, emphasis added). On its face, the regulation imposes

content-based criteria and was, therefore, properly subjected to the analysis dictated by this Court in *Arkansas Writers*'.

(2) Petitioner presents the question whether, under the Equal Protection Clause, Tennessee's tax scheme must satisfy "strict scrutiny." Petitioner asserts that the Tennessee Supreme Court misapplied "equal protection principles" (Petition, p. 7), and argues that this case affords an opportunity to "clarify" the required "equal protection analysis." (Petition, pp. 8, 15). In fact, the inapplicability of an equal protection analysis is clear.

This Court has made plain in *Minneapolis Star* and *Arkansas Writers*' that, where the press is subject to discriminatory taxation, an equal protection analysis (used, for example, in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (decided two months after *Minneapolis Star* but with no reference to it) or in the dissent in *Minneapolis Star* (460 U.S. at 601, Rehnquist, J.)) must yield to the requirement that the government establish a compelling state interest to rescue an otherwise unconstitutional tax scheme.

Consistent with this Court's precedents, the decision of the Tennessee Supreme Court on the federal question rests solely on First Amendment grounds. (App. 8). This petition presents no opportunity to examine whether the Tennessee Supreme Court misapplied equal protection principles since, appropriately, that Court did not undertake an equal protection analysis⁴ at all. Petitioner was required to establish a compelling state interest and failed to do so.

⁴ Thus, "strict scrutiny," a standard drawn from equal protection analysis (see, *Minneapolis Star*, 460 U.S. at 601, Rehnquist J., dissenting) has no role in the present case.

II.

The Tennessee Supreme Court Properly Applied This Court's Precedent In Holding That The Tennessee Sales Tax Scheme Unlawfully Discriminates On The Basis Of Content.

Basing tax status on content "is particularly repugnant to First Amendment principles." *Arkansas Writers'*, 481 U.S. at 229. The Tennessee Supreme Court correctly found that the Tennessee tax regulations, on their face, base tax status on content, and thus run afoul of this Court's decision in *Arkansas Writers'*.

To qualify for the "newspaper" exemption to the Tennessee sales tax, a publication must meet four published criteria. The fourth of these criteria defines the matter which an exempt newspaper "must contain."

Rule 46 of the Tennessee State Sales and Use Tax Regulations (1320-5-1-.46), (App. 45) provides:

(2) In order to constitute a newspaper, the publication must contain at least the following elements:

(a) It must be published at stated short intervals (usually daily or weekly).

(b) It must not, when its successive issues are put together, constitute a book.

(c) It must be intended for circulation among the general public.

(d) It must contain matters of general interest or reports of current events.

The Tennessee Supreme Court reached the unavoidable conclusion that Rule 46(2)(d), "is not a

content-neutral requirement.”⁵ (App. 6). Having found content-based discrimination, the Tennessee Supreme Court considered and rejected the state’s attempt to identify a compelling state interest based on the proposition that “immediate” dissemination of the news deserves special protection. (App. 7-8).

The Tennessee tax scheme discriminates between “newspapers” and “magazines,” exempting the former while taxing the latter. In striking down Arkansas’ tax scheme which exempted some magazines based on their content, this Court thereby eliminated Arkansas’ differential treatment of newspapers and magazines and observed: “Accordingly, we need not decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press.” *Arkansas Writers’*, 481 U.S. at 233. Grasping at this reservation, petitioner urges that the present case is one of first impression, presenting exactly the facts which the *Arkansas Writers’* decision did not reach. (Petition, pp. 8-9). Petitioner is wrong.

Arkansas Writers’ prohibits any content-based discrimination, whether among periodicals of the same type or “between different types of periodicals.” This Court was unequivocal in stating that “. . . official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment’s guarantee of freedom of the press.” 481 U.S. at 230. Since Tennessee’s discriminatory tax scheme is content-based, its unconstitutionality is already established by this Court’s precedent. There is no need to invoke “an additional basis for invalidating the sales tax,

⁵ Nowhere in fifteen pages of argument does petitioner challenge the accuracy of this finding.

as applied to the press." *Arkansas Writers'*, 481 U.S. at 233.

III.

The Tennessee Supreme Court Applied The Proper Standard; Even If Tennessee's Discriminatory Tax Scheme Were Content-Neutral, Petitioner Still Must Establish A Compelling State Interest.

The Tennessee Supreme Court properly found that there was no compelling state interest to support a tax which discriminated between "newspapers" and "magazines" on the basis of content. (App. 8). Petitioner now asserts, contrary to fact, that its discrimination between "newspapers" and "magazines" is content-neutral, and therefore the State need not meet the heavy burden of establishing a "compelling state interest."⁶ (Petition at i, 10-11, 13).

This argument is at odds with both *Minneapolis Star* and *Arkansas Writers'*. This Court established in *Minneapolis Star* that

[d]ifferential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

⁶ We emphasize that petitioner nowhere asserts that there is, in fact, a compelling state interest. The closest petitioner comes is to assert a "widely held and logical view that newspapers have historically served, and continue to serve, some important public purpose separate and different from the functions of magazines and other forms of expression." (Petition, p. 10). This "important public purpose" is nowhere identified, nor is the State's interest in subsidizing it explained.

460 U.S. 575 at 585. The Court added that “[a] tax that singles out the press or that targets individual publications within the press, places a heavy burden on the State to justify its action.” 460 U.S. 575 at 592-93. Minnesota was required to meet this heavy burden even though its discriminatory taxing scheme did not depend upon content. In *Arkansas Writers’*, where the taxing scheme did discriminate on the basis of content, the State faced the same heavy burden.

Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Minneapolis Star*, 460 U.S., at 591-592.

481 U.S. at 231.

Thus, even if Tennessee’s taxing scheme were erroneously seen as content-neutral, the scheme “burdens rights protected by the First Amendment,” *Minneapolis Star*, 460 U.S. at 582, and petitioner faces the same heavy burden. The Tennessee Supreme Court applied the correct standard in ruling that petitioner had not met its burden. This ruling—that petitioner had not met its burden—is not challenged in the petition, and the standard applied by the Tennessee Supreme Court is mandated by this Court’s decisions.

IV.

The Tennessee Tax Scheme, As Applied, Arbitrarily Singles Out Members Of The Press To Tax And Is Therefore Unconstitutional.

In *Minneapolis Star*, this Court said that

recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

460 U.S. at 592.

Tennessee's tax regulations provide that publications will pay no sales tax if they are published at stated short intervals, if they do not constitute a book when successive issues are put together, if they are intended for circulation among the general public, and if they contain matters of general interest or reports of current events. (Rule 46, App. 45).

Petitioner has stipulated (App. 21) that *Newsweek* meets all four of the Rule 46 criteria. Nevertheless, petitioner has singled out respondent to pay tax, penalty and interest on its subscription sales of *Newsweek*, while exempting other publications which similarly satisfy the criteria of Rule 46. No interest suggested by Tennessee can justify exemption of only some of the publications which meet its stated exemption criteria.

Petitioner argued to the Tennessee Supreme Court that the legislature could favor the timely and immediate dissemination of news. The Court found this not to be a compelling state interest, finding no basis to give "immediate news a privileged position." Moreover, even if favoring "immediate" news were thought to represent a compelling state interest, the Tennessee tax scheme does not further that interest. As the Tennessee Supreme Court observed, "*Newsweek* publishes as frequently as many exempt newspapers," (App. 7, 8) and thus provides "immediate" news.

Abandoning its "timely and immediate dissemination" rationale, petitioner now argues the following:

A distinction between newspapers and magazines based upon the differing production, marketing, and distribution operations of the respective publishing businesses, and upon the physical character, format, and "shelf-life" of their products, would not refer to the content, much less the viewpoint, of the publications themselves. (Petition, p. 10).

Whether, in the abstract, these distinctions could justify discriminatory taxation is irrelevant, because these distinctions are not applied in Tennessee. Tennessee's tax regulations have nothing to do with such things as "distribution operations" or "shelf-life." Only Rule 46 criteria establish the "exempted" class, but not all publications which meet the criteria are granted the exemption.

Because there is no legitimate state interest in singling out *Newsweek*, *Minneapolis Star* compels the result reached by the Tennessee Supreme Court.

V.

This Court Should Not Grant Certiorari Because The Tennessee State Supreme Court's Holding Is Based On An Adequate And Independent State Ground.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court held that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Id.* at 1038, (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

Completely separate analyses of the state and federal issues are not required:

... even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. *New York City v. Central Savings Bank*, 306 U.S. 661, explained in *Minnesota v. National Tea Co.*, 309 U.S. 551, 556-7; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52.

Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487, 491-2 (1965).⁷

The holding of the Tennessee Supreme Court in the present case rests on independent and adequate state grounds. That court held that the Tennessee tax scheme violated both "the First Amendment to the United States Constitution and Article 1, Sec. 19 of the Tennessee Constitution."⁸ The fact that the state and federal analyses were done together does not taint the independence of the state ground of decision.

⁷ But see *New York v. Class*, 475 U.S. 106 (1986), which held that a New York Court of Appeals decision, which merely cited the State Constitution in its holding, did not offer an independent state ground. The New York Court of Appeals holding reviewed in *New York v. Class*, however, did not clarify whether the state constitutional right relied on in its state-based holding was to be construed more broadly than the corresponding federal right. Thus, the New York Court of Appeals left unclear whether it felt compelled to rule as it did because it "believed that federal law required it to do so," *Michigan v. Long*, 463 U.S. at 1041.

⁸ *Southern Living, Inc. v. Celauro*, (App. 12) addressing an issue identical to that raised below by respondent. Compare App. 16 and App. 29.

In Tennessee, the Federal Constitution establishes only the minimum guarantees granted under the Tennessee Constitution. The Tennessee Supreme Court reiterated in the present cases that the "Tennessee Constitution Article 1, Section 19 should be construed to have a scope *at least as broad* as that afforded those freedoms by the First Amendment of the United States Constitution. *Leech v. American Book Sellers Ass'n, Inc.*, 582 S.W.2d 736, 745 (Tenn. 1979)." ⁹ Thus, the Tennessee Supreme Court has provided an independent and adequate state basis for its decision which would be unimpeached by any action of this Court on the federal question.

VI.

There Are No Special And Important Reasons For Granting The Petition

On this petition, no decision of a United States Court of Appeals is implicated, and each state court which has considered the issues raised in the petition has decided those issues in a manner consistent with the decision of the Tennessee Supreme Court.¹⁰ The questions presented

⁹ *Southern Living, Inc. v. Celauro*, (App. 14, emphasis added). Accordingly, this is not a case where the federal right was the standard for measuring the bounds of the state right. See *Kentucky v. Stincer*, 482 U.S. 730 (1987) (no independent state ground exists when the "[state] court gave no indication that respondent's rights under . . . the Kentucky Constitution were distinct from or broader than, respondent's rights under the Sixth Amendment." *Id.* at 735-6); *Maryland v. Garrison*, 480 U.S. 79, 83 (1987) (no independent ground exists where the state court holds the State Constitution to be *in pari materia* with the Federal Constitution).

¹⁰ *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. Ct. App. 1987); *McGraw-Hill, Inc. v. State Tax Comm'n.*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (N.Y. App. Div. 1989), *aff'd* 75 N.Y.2d 852, 552 N.E.2d 163, 552 N.Y.S.2d 915 (1990); *Hearst Corp. v. Director of Revenue*, 779 S.W.2d 557 (Mo. 1989); *Dow Jones & Co. v. State ex rel Oklahoma Tax Comm'n.*, 787 P.2d 843 (Okla. 1990); *Dep't. of Revenue v. Magazine Publishers of America*, No. 75,201 (Fla. May 31, 1990).
(Note continued on following page)

in this petition have been settled by this Court's decisions in *Minneapolis Star* and *Arkansas Writers'*, and the holdings in those cases were correctly applied by the Tennessee Supreme Court.

Accordingly, there is no basis pursuant to Rule 10 of this Court's rules for granting the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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